

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v.

**DECISION AND ORDER**  
08-CR-0232S

JESUS ANTONIO COTTO,

Defendant.

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1. On October 11, 2013, over four months after he was sentenced by this Court and judgment was entered by the Clerk, Defendant filed a motion for leave to appeal. Alternatively, Defendant requested this Court consider his motion as a petition under 28 U.S.C. § 2255. In connection with both requests, Defendant argued that his attorney failed to file a notice of appeal despite his alleged instructions to do so.

2. This Court lacked authority to extend the time to appeal beyond the time period set forth in the Federal Rules of Appellate Procedure, which preclude extending the time to file a notice of appeal beyond 30 days from the expiration of the time otherwise prescribed. See Fed. R. App. P. 5 (a notice of appeal must be filed in the district court within 14 days after the entry of either the judgment or the order being appealed). Leave was accordingly denied; however, the Court indicated that it would consider Defendant's alternative request to treat his motion as a petition pursuant to 28 U.S.C. § 2255. (Docket No. 159); see Campusano v. United States, 442 F.3d 770, 773 (2d Cir. 2006) (prejudice is presumed where counsel fails to file a requested notice of appeal). Because such treatment would impact Defendant's ability to bring successive habeas motions, see 28 U.S.C. § 2255(h) (a second or successive petition requires a showing of newly discovered

evidence or a new, retroactive applicable law), Defendant was ordered either withdraw, amend, or inform this Court of his intention to press forward with his § 2255 by February 1, 2014. At that time, Defendant's former trial counsel was ordered to respond to the allegation of ineffective assistance.

3. Defendant failed to respond by the deadline, and further failed to respond by an extended deadline of May 15, 2014. Defendant instead filed another notice of appeal on June 11, 2014, but neither referenced nor specifically challenged the version of facts detailed by his former trial attorney in the directed affirmation. Accordingly, this Court declines to treat Defendant's initial motion for leave to appeal as a petition pursuant § 2255, and that motion is dismissed. (Docket No. 156.) Finally, to the extent that Defendant seeks leave from this Court to appeal in his June 2011 filing, (Docket No. 165), that motion must also be denied. See Fed. R. App. P. 5.

SO ORDERED.

Dated: November 19, 2014  
Buffalo, New York

/s/William M. Skretny  
Chief Judge Skretny  
United States District Court